

CADWALADER

Cadwalader, Wickersham & Taft

1201 F Street N.W., Suite 1100
Washington, DC 20004
Tel: 202 862-2200
Fax: 202 862-2400

New York
Washington
Charlotte
London

James K. Robinson
Direct Dial: (202) 862-2494
Direct Fax: (202) 862-2400
E-Mail: James.K.Robinson@cwtt.com

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OFFICE OF
THE CHIEF JUSTICE

July 16, 2002

Corbin R. Davis, Esq.
Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

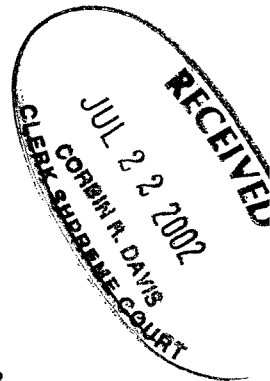
Re: Proposed Amendment to MRE 703

Dear Mr. Davis:

At the risk of prolonging the debate over 1) the intended meaning of MRE 703 ("Bases of Opinion Testimony by Experts"), and 2) the wisdom of the proposed amendments to the rule, this letter responds to my friend Judge William Giovan's July 11, 2002, letter in which he takes issue with my reading of current MRE 703 and my criticisms of the proposed amendments. I am, of course, flattered by his suggestion that because of my "eminence in the field of evidence" he fears that the Court might accept my assessment of the proposed amendments "solely on the basis of [my] considerable expertise." It seems to me that my friend may be suffering from "expertphobia." While I am confident that his fears in this regard are not well founded, I do think this is a very important issue for the bench and bar of Michigan, and so I offer these additional thoughts in response to Judge Giovan.

Judge Giovan and I agree that the current version of MRE 703 is poorly drafted and it needs reform. If our disagreement about what MRE 703 means, and what it actually was intended to mean, proves anything, it is that reasonable minds can and do differ about its meaning. The trial judges and lawyers of Michigan deserve better, as does the public we all seek to serve.

Judge Giovan and I strongly disagree about the appropriate "fix" for the problem. The root of our disagreement is whether the adoption of FRE 703 by the United States Supreme Court and the Congress in 1975 was "a mistake," as Judge Giovan argues, or,



as I contend, a sensible and appropriate innovation designed, as the FRE Advisory Committee said, "to bring the judicial practice into line with the practice of the experts themselves when not in court." This is not a pro-plaintiff or pro-defense disagreement. Under MRE 702 all litigants are entitled to make use of experts to "assist the trier of fact understand the evidence or to determine a fact in issue."

The core question is what facts or data should experts be permitted to rely upon in forming their opinions when testifying in court? Should they be limited to the facts or data admissible in court under the exclusionary rules of evidence for jury trials? Or should they be permitted to rely upon facts or data of a type reasonably relied upon by experts in the particular field in forming opinions on the subject? In the "real world" would Americans like their physicians, engineers, architects and rocket scientists to limit their opinion data base in diagnosing disease, designing cars, building bridges, and designing space shuttles to those that could independently be admitted in court under our exclusionary jury trial rules of evidence? I think not. Why then should we limit the ability of experts to assist the trier of fact in the trial of a case where our goal is the ascertainment of the truth?

As I mentioned in my original letter to the Court, there is a legitimate concern that permitting experts to rely on otherwise inadmissible data to form their opinions may circumvent some exclusionary rules of evidence and unfairly expose such information to a jury. The recent 2000 amendment to FRE 703 addresses that issue by providing: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect." This approach strikes a reasonable balance. It allows experts to rely on the type of data experts reasonably rely upon in forming their opinions in the "real world," and yet it permits the trial judge to keep otherwise inadmissible information from the jury if its value in evaluating the expert's opinion is substantially outweighed by its prejudicial effect. Judge Giovan's proposal, on the other hand, would require the exclusion of reliable and helpful expert opinions. In my view it would throw the baby out with the bath water.

I leave it to those with the patience and interest to parse my June 11 letter and Judge Giovan's July 12 response to decide which of us offers the better reading of MRE 703 as it is currently written. I certainly hope that the Court will amend MRE 703 and that such an academic exercise will soon be unnecessary. My point is that the first sentence of MRE 703 is identical to the first sentence of FRE 703 and all courts I know of have construed that sentence to permit experts to rely on facts and data not "in evidence" in the case and, indeed, not even admissible in evidence. MRE 703 expressly states that experts may base their opinions on facts or data "perceived by or made known to the expert . . . before the hearing." Judge Giovan argues that the Michigan Supreme Court then somehow took back what the first sentence granted, and created an exclusionary rule giving judges the authority to exclude expert opinions not based on evidence independently "in evidence" or independently admissible in

evidence. It did so, according to Judge Giovan, when the Court deleted the second sentence of proposed MRE 703 (which expressly permitted experts to rely on facts or data not otherwise admissible in evidence if "of a type reasonably relied on by experts in the particular field in forming opinions on the subject") and instead inserted a new sentence which provides: "The court may require that the underlying facts or data essential to an opinion be in evidence." What does it mean to be "in evidence"? In my view, if facts or data are offered and admitted for the limited purpose of assisting the trier of fact in evaluating the weight and credibility of the expert's opinion, it is still "in evidence." MRE 104, for example, dealing with "preliminary questions," specifically references the right of parties "to introduce before the jury evidence relevant to weight or credibility."

Reading MRE 703 which grants judicial authority to insist that underlying facts or data essential to an expert's opinion be "in evidence" as a grant of judicial authority to exclude expert opinions entirely seems to me to be a very tortured way to accomplish a result which, if intended, could have been achieved quite simply. The Court could have adopted language which would have expressly stated that trial judges may exclude expert opinions if they are based on facts or data not "in evidence" or not "admissible in evidence independent of serving as a bases for the expert's opinion." If, as Judge Giovan suggests, this was what the Court really had in mind in 1978 in crafting MRE 703, talk about hiding the ball!

As "legislative history" supportive of his interpretation of MRE 703, Judge Giovan offers the hearsay statement of former Justice James Ryan. He writes that former Justices Ryan and Levin "went through the committee proposal line by line, debating each rule and making changes where deemed appropriate, including the changes to Rule 703." We are told by Judge Giovan that he has spoken with Judge Ryan and he agrees with Judge Giovan's reading of MRE 703. "You can ask him" he says. The fact is, however, that in 1978 when the Court adopted MRE 703 it left no "official" legislative history to explain its intent. We are left with the words it used in MRE 703. Judge Giovan's tortured reading of MRE 703, together with his "unofficial" legislative history, is enough to make me a strict constructionist!

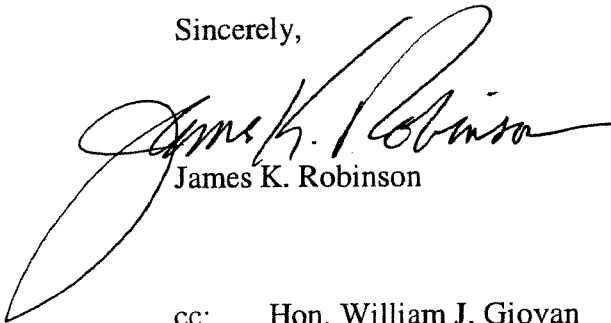
Finally, Judge Giovan takes issue with my statement that to the best of my knowledge if Michigan were to revert to the pre-Rule 703 approach of requiring that expert opinions be based entirely on facts or data independently admitted or at least admissible in evidence, it would be the only jurisdiction in the United States to adopt such an approach. Judge Giovan cites Ohio as a jurisdiction with such a rule; however, Ohio's version of Rule 703 does not provide for the exclusion of opinions simply because the expert relied upon facts or data not "in evidence." Indeed the language of the Ohio rule itself, like MRE 703, permits experts to rely on facts or data "perceived by [the expert] or admitted in evidence at the hearing." (Emphasis added.) As the Ohio Supreme Court noted in State v Solomon, 59 Ohio St. 124, 570 N.E. 1118 (1991): "[W]e find that where an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirement of Evid. R. 703 has been satisfied.

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It is important to note that Evid. R. 703 is written in the disjunctive. Opinions may be based on perceptions or facts or data admitted in evidence." Even Judge Giovan concedes that a majority of the states have adopted versions of Rule 703 identical to FRE 703 which permit experts in forming their opinions to rely on facts or data even if they are not "in evidence." I strongly disagree with Judge Giovan's assertion that "Michigan would be in plenty of good company if we should return to the common law rule, which would be the effect of adopting the Advisory Committee's recommendation for amending MRE 703." Instead, I believe that if Judge Giovan's proposal is adopted, Michigan's "new" Rule 703 would stick out like a "sore thumb."

The Michigan Supreme Court now has the opportunity, indeed I submit the responsibility, to clarify the law in this important area. The decision to adopt a rule which would be contrary to the weight of scholarly thought on the subject, as well as inconsistent with the applicable federal rule and a clear majority of the other states, should not be undertaken lightly. The far better course would be for the Court to adopt the language of FRE 703 with its 2000 amendments.

Sincerely,

A handwritten signature in cursive script, reading "James K. Robinson". The signature is written in dark ink and is positioned above the printed name.

James K. Robinson

cc: Hon. William J. Giovan
Prof. John W. Reed
Hon. John D. O'Hair
Hon. James L. Ryan
Michigan Lawyers Weekly